

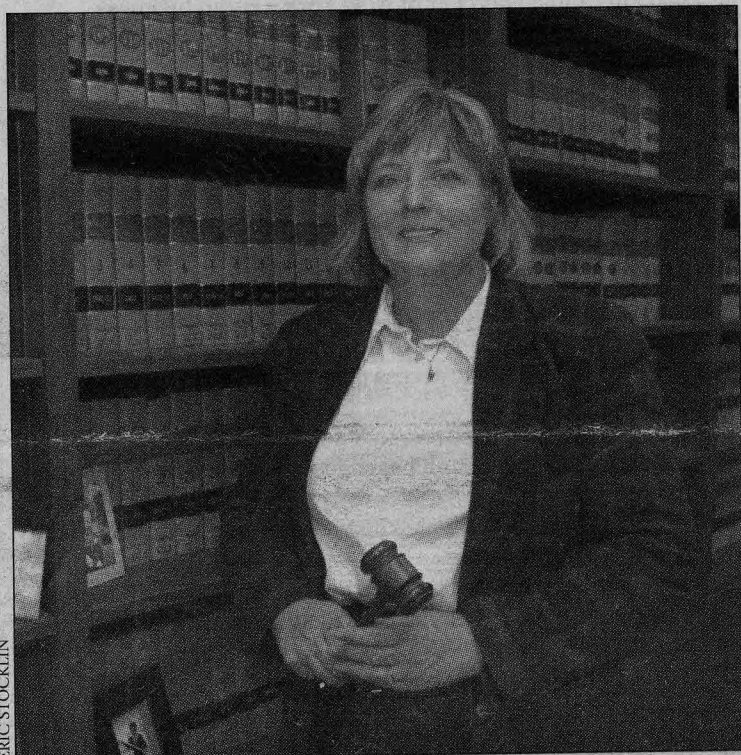
■ THE JUDICIARY

# What Price for Diversity on Maryland's Bench?

*Glendening Criticized for Appointments, But Strays Little From White Male Network, Survey Shows*

BY MARK R. CHESHIRE

Daily Record Business Writer



ERIC STOCKLIN

Lawyer Kathleen Gallogly Cox was named by Gov. Parris N. Glendening to a Circuit Court Seat in Baltimore County even though she had no judicial experience. Glendening passed over judges serving on the lower District Court.



ADKINS: TWICE PROMOTED



BELL: CONTROVERSIAL PICK

As he prepared to select a new judge for the Baltimore County bench, Gov. Parris N. Glendening said he received a warning. It didn't come crashing through a window tied to a brick, but it was just as jarring.

You're going too far too fast, some local politicians and attorneys admonished, referring to the number of women and minorities he had placed on Maryland's various courts since taking office in 1995.

They bridled that the Baltimore County Circuit Court already had an African-American judge and a female judge, and that enough was enough, Glendening recalled during a recent interview.

His response was, and remains, straightforward and brief — which perhaps is fitting for the first non-lawyer to serve as governor of Maryland since J. Millard Tawes' term ended more than 30 years ago.

"I think that's ridiculous," Glendening said dismissively.

## Politically correct?

Of course, the governor went on to appoint a woman, Kathleen Gallogly Cox, who recently was sworn in amid controversy.

A lawyer with no judicial experience, Cox was selected over sitting judges from a lower court — white, male judges — leading some to wonder whether the most-qualified candidates had been passed over in favor of the politically correct choice.

Indeed, there are those who think that the governor *routinely* selects judges based on race and gender rather than experience and ability. After all, Glendening repeatedly refers to a more inclusive government as

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one of his top three priorities.

But a Daily Record study of the governor's judicial appointments — and they soon will number 102 — doesn't necessarily support his critics.

Most, quite simply, are still white men — a fact that practically begs the question: Why is the so-called good, ol' boys network issuing warnings to the governor when most appointments continue to be white males?

The answer is relatively simple, if not all that politically sexy. The governor has completely refashioned the future of Maryland's courts.

## Track record

After four full years in office, Glendening has made 96 appointments. Of the 271 seats on Maryland's four-tiered bench (six are currently vacant), the governor is responsible for nearly four out of every 10 judges in the state.

Of his appointments, 54 — or 56 percent — are white men, and 42 — or 44 percent — are women or racial minorities or both. Among his appointments there are 12 African-American females and nine African-American males. And there are 19 white and two Hispanic females.

In 1995, Glendening appointed Audrey Carrion to Baltimore's district court. She was the state's first Hispanic judge of either gender. A year later, he appointed Sally Adkins to the Wicomico County Circuit Court, elevating her from the district court, where he also had appointed her. She was the first female judge on either bench in the history of the Eastern Shore.

In 1997, Glendening appointed Howard County's first African-American district court judge — Alice Gail Pollard Clark.

In all, Glendening has increased female representation on the bench by 55 percent and African-American representation by 45 percent. There were no Hispanic judges when he took office.

People on both sides of the debate call the increases astounding. But, then, changes measured in percentages can be misleading. Large percentage increases often result from situations where the starting point is Lilliputian. And that's certainly the case here.

Despite Glendening's efforts, women still make up only 21 percent of the bench. By contrast, women make up about 35 percent of the Maryland State Bar Association's 19,500-attorney membership and about half the population. African Americans represent just 16 percent, even though they make up about 25 percent of the population, and Hispanics represent less than 1 percent.

Indeed, Glendening said the "starting numbers" so alarmed him upon taking office that he immediately created a task force to investigate what, in his view, was going so very wrong.

It has been exactly four years to the month since the task force issued its final report.

The overhaul that has followed is nothing short of dramatic, although it has attracted little, if any, attention outside of legal circles. The best, Glendening and his supporters hope, is yet to come. Opponents, not surprisingly, have a somewhat dimmer view of what lies in the future.

## **Reforming the process**

The reform has centered on judicial nominating commissions.

Ostensibly to de-politicize the judicial nomination process, Gov. Marvin Mandel, in 1970, established separate commissions for the appellate and trial-level courts. No longer would Maryland's governor have the first and last word on new judges.

Under the new system, would-be judges applied to, and interviewed with, panels of lawyers and laypeople. The panels, in turn, would compile for the governor a list of candidates "deemed legally and professionally most fully qualified for judicial office."

The governor must select from the pool of approved applicants.

The process remains the same today. But the panels are different. More specifically, the selection process for panel members is different.

While the creation of the nominating commissions reduced the roles of the governor and other elected officials, the so-called establishment continued to hold sway. A select group of attorneys usually held onto seats on the commissions and controlled which judicial candidates made it to the governor's desk.

Of the 95 lawyer members in 1995, just one was African American. Another 18 were women. Meanwhile, 76 of the state's 95 professional judicial gatekeepers, or 78 percent, were white men.

### **More diversity**

The lay members were more diverse. But many think that non-lawyers frequently deferred to their attorney counterparts, much in the way that laypeople on a medical board will defer to doctors on the selection of a new surgeon.

To make the attorney gatekeepers more diverse, Glendening, in 1995, signed an executive order that in effect gave him the power to take control of two of the six commission seats reserved for lawyers. The task force urged him to go further, to seize control of at least three.

"It is the Task Force's position that more diverse commissions will recruit more diverse pools of judicial applicants and result in a richer and even more distinguished bench," the group concluded in its 10-page report.

"In addition, the presence of diverse nominating commissions will send a strong message that the nominated commission process is open and inclusive and will enhance public trust in the judicial process," it added.

Although the final report represented a hard-fought compromise between its most progressive and conservative members, the Task Force got it exactly right, according to many.

"When bar elections determined who the lawyer members were, prominent lawyers won all the time. It seemed like a network that couldn't be broken into," said

Harry S. Johnson, the first African-American lawyer to make partner at a top Maryland corporate law firm.

### **Creating a perception**

That's not to say that the winners were bad. But it created the perception that the system was not open to everyone, said Johnson, whom Glendening tapped as one of his two lawyer selections for Baltimore City's judicial nominating commission.

"The governor's changes allowed him to try to shape the commissions so that they looked different than before," Johnson said.

Glendening not only looks to make the commissions more diverse in terms of gender and race, he also makes selections with an eye toward practice diversity.

Traditionally, lawyer members were largely civil practitioners, coming as they did from big corporate firms. The governor has worked to add barristers expert in criminal matters, family law and land use, among other areas.

Taking over two more nominations hardly seems groundbreaking. But it was, said Paula J. Peters, an Anne Arundel County private practitioner who served on the task force.

"It was earth-shattering," Peters said. "This really is his legacy. It's very exciting."





Kathleen Gallogly Cox is Gov. Parris N. Glendening's latest appointment to the bench in Maryland. She follows a long list of firsts. Glendening also named the first woman judge on the Eastern Shore, the first Hispanic female judge and Howard County's first Africa-American female district court judge.

People like Peters think the best has yet to come. It takes a while for public perception to catch up with reality. Once women and African-American lawyers come to think that they stand a chance of being selected, they will apply in greater numbers.

"My impression is that people only apply if they think they have a shot of getting it," said William L. Reynolds, a nationally renowned judicial expert and professor at the University of Maryland Law School.

### Ingrained politics

Make no mistake, however, the process is not completely devoid of politics.

On the condition of anonymity, some commission members allowed that they still receive phone calls and other communications from elected officials, encouraging them to decide one way or the other on certain candidates.

Moreover, there are at least a few influential lawyer members who occasionally try to force their selection on other members.

Of course, the governor sometimes is criticized for basing his final decisions on politics. For instance, some eyebrows arched when Glendening recently appointed state Delegate Timothy D. Murphy, D-Baltimore City, and the son of longtime state Sen. Norman R. Stone, D-Baltimore.

Nevertheless, said Reynolds, "I do not believe that Glendening has been as political as many other governors."

And finally, there are the allegations of political correctness gone mad.

Neither the governor nor his top legal adviser, Andrea Leahy-Fuckeck, is shy about using the number of white male selections to beat back opponents.

If we're putting politics over substance, they will ask rhetorically, clearly enjoying the verbal trap, how do the critics explain all the white men?

"If it's form over substance, [Glendening] wouldn't have to spend the hundreds of hours he does evaluating and interviewing candidates," said Leahy-Fuckeck, who is leaving the Glendening administration in May to become an assistant U.S. Attorney for Maryland.

The governor conducts hour-long interviews with every applicant. Considering that three to seven applicants usually make the preliminary cut for every vacancy, Glendening has spent up to 700 hours meeting one-on-one with candidates.

That doesn't account for the time he spends preparing for the interviews, according to staffers.

The work Glendening puts in is obvious, said one of his most recent appointees.

"My interview with Governor Glendening was impressive because he knew everything about me," marveled Stuart R. Berger, a longtime big-firm partner who was appointed the Baltimore City Circuit Court last fall.

Aware that it would be impolitic to complain publicly, most of Glendening's

critics have limited themselves to off-the-record comments. But they soon may get their chance for revenge.

Shortly after Glendening appointed Kathleen G. Cox to the Baltimore County Circuit Court, one of the white male judges Glendening passed over filed papers to contest Cox during the next election.

"I'm running here in Baltimore County because I feel I'm the most qualified. There's no substitute for experience," said Judge Robert N. Dugan of the Baltimore County District Court.

Dugan repeatedly refused to criticize the governor or challenge Cox directly.

A Dugan win in November would be a big loss, a very public rebuff, of Glendening and his reform efforts. And it would be his second such loss, following the election defeat in Howard County of Donna Hill Staton.

So important is Cox's election that Glendening took the unusual step of attending her swearing-in ceremony.

## **Historic firsts**

Glendening already has won some acclaim for his work. He has been asked to give the keynote speech at the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts later this month. Because the event is in Honolulu, he doesn't know if time will allow for him to attend.



Considering Glendening's list of firsts, it is not at all surprising that he has garnered such attention. He named the first African American to Maryland's highest-ranking position in the judiciary when he promoted Robert M. Bell to Chief Judge of the Court of Appeals. He appointed the first Hispanic to the bench in state history, and the list goes on.

If Glendening does go to Hawaii, conference attendees are sure to hear what it all boils down to for Maryland's governor.

"I think, What if a member of my family were before the court?" Glendening said. "I'd want fairness and quality."

Neither is sacrificed by diversifying, he said. In fact, the court improves on both counts when skilled women and minorities are appointed.

As important, the diversification effort should help restore the public's faith in the third branch of government, Glendening and others said.

One recent survey revealed that more than 33 percent of Americans has lost confidence in the judiciary.

It's not surprising that African Americans, for example, feel uncomfortable with a system that bears no resemblance to them or their communities, some say.

But, in the end, there is no way to say with any scientific certainty whether a diverse bench is a better bench.

"All other things being equal, diversification is good," Reynolds said. "But it's impossible to answer in the abstract."

Glendening has no such doubts.

"It was the right thing to do," he resolutely asserts.